

United States Government

Department of Energy

memorandum

DATE: February 29, 2000

REPLY TO: Office of Environmental Policy and Assistance: Thompson:69581
ATTN OF:

SUBJECT: CLEAN WATER ACT: National Pollutant Discharge Elimination System—Regulations for
Revision of the Water Pollution Control Program Addressing Storm Water Discharges

TO: Distribution

The purpose of this memorandum is to provide information regarding the Environmental Protection Agency (EPA) final rule: *National Pollutant Discharge Elimination System (NPDES) Regulations for the Revision of the Water Pollution Control Program Addressing Storm Water Discharges* (Phase II). The rule was published in the Federal Register on December 8, 1999 and became effective on February 7, 2000. The Phase II rule expands the existing NPDES storm water program to address storm water discharges from small (those serving less than 100,000 persons) municipal separate storm sewer systems (MS4) and construction sites that disturb one to five acres. Phase I of the storm water program, which was promulgated in November 1990, covered municipal storm sewer systems serving populations over 100,000, construction sites above five acres, and industrial activities. The Office of Environmental Policy and Guidance issued guidance in December 1990 regarding Phase I rule.

Small Municipal Separate Storm Sewer Systems (MS4s)

The Phase II rule automatically covers on a nationwide basis all small MS4s located in urbanized areas as defined by the Bureau of Census, and on a case-by-case basis those small MS4s located outside of urbanized areas that are designated by the NPDES permitting authority. Owners or operators of regulated small MS4s would be required to design their programs to: 1) reduce the discharge of pollutants to the “maximum extent practicable” and 2) protect water quality.

The successful implementation of approved best management practices (BMPs) is considered compliance with the technical standard of “maximum extent practicable”. The Phase II rule considers narrative effluent limitations to achieve the protection of measurable goals as the most appropriate form of effluent limitations to achieve the protection of water quality, rather than requiring storm water discharges to meet numeric effluent limitations. The use of narrative, rather than numeric, effluent limitations are used as a form of measurable goals.

The small MS4 storm water management program would need to include the following six minimum control measures: public education and outreach; public participation/involvement; illicit discharge detection and elimination; construction site runoff control: post-construction runoff control; and pollution prevention/good housekeeping.

Rather than individual permits, which were required for the Phase I MS4s, the Phase II program for MS4s is designed to accommodate a general permit approach using a Notice of Intent (NOI) as the permit application. Regulated MS4 owners or operators would need to include their selection of BMPs and measurable goals for each minimum measure in their permit application. The evaluation and assessment of chosen BMPs and measurable goals would need to be included in periodic reports to the NPDES permitting authority.

Construction Activity

The Phase I NPDES storm water permitting rule identifies eleven categories of industrial activity in the definition of “storm water discharges associated with industrial activity” that must obtain an NPDES permit. One of these categories is construction activity. The Phase I rule requires all operators of construction activity disturbing 5 or more acres of land to apply for a storm water permit. Operations of sites disturbing less than 5 acres also are required to obtain a permit under Phase I if they are part of a “larger common plan of development or sale” with a planned disturbance of 5 or more acres. “Disturbance” refers to exposed soil resulting from activities such as clearing, grading, and excavating. Construction activities can include road building, construction of residential houses, office building, industrial sites, or demolition.

The Phase II rule automatically covers, under the NPDES storm water permitting program, all owners or operators of construction site activities that result in land disturbance of equal to or greater than 1 but less than 5 acres. Site activities disturbing less than 1 acre would also be included in the NPDES storm water program if they are part of a larger common plan of development or sale with a planned disturbance of equal to or greater than 1 acre but less than 5 acres, or if they are designated by the NPDES permitting authority. The permitting authority may designate construction activities disturbing less than 1 acre if a project is deemed to have the potential for adverse impacts on water quality or for significant contribution of pollutants based on a Total Maximum Daily Load (TMDL), watershed, or other local assessment.

Waivers would be granted by the NPDES permitting authority to owners or operators of Phase II construction activity who could certify to any one of three conditions: 1) low predicted rainfall; 2) low predicted soil loss; and 3) a determination that storm water controls are not necessary. EPA states that the intent of the waiver provision is to waive only those sites that are highly unlikely to have a negative effect on water quality. Therefore, owners or operators of Phase II construction activity are encouraged to consider the potential water quality impacts that may result from their project and to carefully examine such factors as proximity to water resources and sensitivity of receiving waters.

Owners or operators of Phase II construction sites are required to obtain an NPDES permit and implement practices to minimize pollutant runoff. It is important to note that, locally, these same sites may also be covered by State, Tribal, or local construction runoff control programs. For the Phase II construction program, EPA has taken an approach similar to the Phase I approach where the program requirements are not fully defined in the rule but rather in the NPDES permit by the NPDES permitting authority.

Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the applicable requirements in a general permit for a storm water discharger from construction activities that disturb less than five acres based on any one of the three conditions listed above. Dischargers are required to apply for an individual permit by March 10, 2003 or seek coverage under a promulgated storm water general permit.

Conditional No Exposure Exemption for Industrial Activity

EPA intended to provide facilities with industrial materials and activities that are entirely sheltered from storm water a simplified way of complying with the Clean Water Act's storm water provisions. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt, and/or runoff. In addition, the discharger must satisfy several conditions outlined in the rule including a certification. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. The no exposure exemption was addressed in the Phase I rule and is being re-addressed in the Phase II rule as result of a lawsuit.

Report to Congress

In addition to the Phase II storm water final rule, EPA also issued an announcement of the issuance of the *Report To Congress On The Phase II Storm Water Regulations* on December 8, 1999. This report is provided to Congress as a result of compliance with 1999 "Appropriations Act". The report also addresses several issues related to EPA rulemaking to implement Section 402(p)(6) of the Clean Water Act. This rulemaking is also referred to as the Storm Water Phase II rule. Section 431(a) of the Appropriations Act directs the Administrator to submit a report containing:

- 1) an in-depth impact analysis on the effect the final regulations will have on urban, suburban, and rural local governments subject to the regulations;
- 2) an explanation of the rationale of the Administrator for lowering the construction site threshold from 5 acres to 1 acre;
- 3) documentation demonstrating that storm water runoff is generally a problem in communities with populations of 50,000 to 100,000 (including an explanation of why the coverage of the regulation is based on a census-determined population instead of a water quality threshold;
- 4) information that supports the position of the Administrator that the Phase II storm water program should be administered as part of the NPDES.

EPA is required under to publish the reports in the Federal Register for public comment. The Appropriations Act does not specify whether EPA should seek and respond to public comment on the reports prior to submitting them to the Committees.

EPA has developed a storm water phase II fact sheet series available at <http://www.epa.gov/owm/sw/phase2>. This series will be updated to reflect the final rule. The final rule and the Report to Congress are also available at the EPA web site. If you have questions regarding the subject final rule, please contact Lois Thompson at (202) 586-9581 or lois.thompson@eh.doe.gov.

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